

Transportation Event Recorder Data: Balancing Federal Public Policy and Privacy Rights

Gregory L. Evans⁺

I. **Introduction**

The public interest in gathering data from event recorders can be harmonized with the ownership rights which railroads have in such data.¹ If railroad safety is to be advanced in our nation, data available from event recorders on trains involved in major accidents must be provided to the National Transportation Safety Board and the Federal Railroad Administration. Railroad safety is enhanced through analysis of valid event recorder data. Existing law governing the production of event recorder data should be clarified, however, to facilitate a railroad's immediate use of event recorder data and to minimize service delays. Railroads are sometimes prevented from retrieving event recorder data immediately following an accident because federal investigators believe they are authorized to order railroads not to touch anything involved in the accident, including event recorder data, until they arrive.

Existing law allows NTSB to conduct investigations without interfering with railroad operations. The same law instructs NTSB to conduct investigations in any manner designed to preserve all evidence to the maximum extent feasible, and mandates the cooperation of railroads. NTSB's contradictory regulations lead to frequent misunderstandings between railroads and NTSB during the response to many major accidents. This article briefly discusses this issue as it relates to event recorder data, and recommends clarification in NTSB regulations.

II. **Discussion**

A. Event Recorder Data Preservation & Analysis

The United States has made safety in railroad operations a national priority. Through the Federal Railroad Administration ("FRA") and the National Transportation

⁺ Gregory L. Evans is a partner with the law firm of Preston, Gates & Ellis. Greg serves primarily as outside counsel for one of our nation's largest freight railroads. His practice involves regulatory and government affairs in the transportation industry.

¹ The FRA defines an event recorder as "a device, designed to resist tampering, that monitors and records data on train speed, direction of motion, time, distance, throttle position, brake applications and operations (including train brake, independent brake, and, if so equipped, dynamic brake applications and operations) and, where the locomotive is so equipped, cab signal aspect(s), over the most recent 48 hours of operation of the electrical system of the locomotive on which it is installed...: 49 C.F.R. Sec. 229.5 (g).

Safety Board (“NTSB”),² each year the United States government commits significant resources to study the cause of railroad accidents. The federal government and the railway industries also devote considerable resources to develop accident prevention technologies.³ Event recorder data retrieved from trains involved in accidents can be the most useful information to assist in understanding the cause of accidents and to assist in the development of safer equipment and operating practices. While event recorder data is unquestionably useful, the manner in which the government sometimes requires the production of such data should be reviewed.

B. Preservation of Event Recorder Data in Emergency Settings

NTSB and FRA officials are required to respond to major railroad accidents.⁴ Investigators are not, however, empowered to halt a railroad’s accident investigation and clean-up activities simply to obtain event recorder data. Nevertheless, investigators often demand that a railroad preserve the accident scene, including the event recorder data on the locomotive, until investigators arrive. On many occasions, however, an accident can be cleared and railroad operations resumed, long before an NTSB or FRA investigator is present. Even when investigators arrive at the accident scene shortly after an accident, unnecessary and costly delays are sometimes caused by an investigator’s demand to preserve event recorder data. Recently, FRA recognized that a railroad should be allowed to retrieve, preserve, copy and use event recorder data immediately following an accident.

FRA abandoned a proposed regulation which would have prohibited railroads from removing and handling event recorder data for at least eight hours after an accident, or until the data was released by the NTSB. In response to petitions, the Department of Transportation and FRA withdrew the proposed eight hour hold.⁵ FRA concluded that railroads have a competing, if not more immediate, need for quick access to event recorder data. In many instances, reasoned FRA, immediate access and evaluation of event recorder data promotes railroads to quickly implement operational improvements and, in some situations, aids railroads in pinpointing physical evidence that should be examined before the expiration of too much time or before the track is put back into service.⁶ FRA also acknowledged that the proposed eight hour hold could cause unnecessary service delays.

² The National Transportation Safety Board is an independent federal agency mandated by Congress to investigate railroads. In 1975, Congress removed NTSB from the U.S. Department of Transportation and made NTSB completely independent of any other federal agency.

³ For example, FRA, the Association of American Railroads, and the country’s major freight railroads are currently working toward a technology known as positive train separation (“PTS”). PTS relies upon speed data gathered from locomotives to determine safe operating distances and, when necessary, to employ automated train control and separation systems designed to prevent collisions.

⁴ See 49 C.F.R. Sec. 225.31; 49 C.F.R. Sec. 800.3

⁵ See, Federal Register, Vol. 60, No. 102, May 26, 1995.

⁶ Id at page 27900

While FRA now recognizes a railway's right to immediate access to event recorder data, some states continue to advance an exceedingly strong interest in the data.⁷ While a state's right in event recorder data is outweighed by the railroad's right to such data, because of unclear laws, NTSB's priority interest is still unsettled.

C. *NTSB Statute Ambiguous*

Federal regulations governing NTSB investigations provide a dual, contradictory mandate. On the one hand, the statute tells NTSB not to unnecessarily obstruct transportation activities during an investigation. The same statute orders NTSB to preserve all evidence relating to the accident and requires the transportation company to cooperate. This language has been interpreted by NTSB investigators to allow for virtual lock-downs at accident sites.

NTSB's statutory authority for investigations is written as follows:

...Any employee of the[National Transportation Safety] Board, upon presenting appropriate credentials, is authorized to test or examine any vehicle, vessel, rolling stock, track, pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. *Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services...and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accident, consistent with the needs of the investigation and with the cooperation of such owner or operator.* (Emphasis added) 49 C.F.R. 831.9(c)(1)(2).

With these vague, competing mandates, the stage is set for continued confrontation over the term "unnecessary obstruction," and what investigators might believe they are required to do to preserve evidence to the "maximum extent feasible." Taking the FRA's position into account, and understanding that retrieval of event recorder can occur while preserving the data in its original form, NTSB should agree that it will not delay a railroad from retrieving event recorder data. Either by way of a memorandum or a change in statute, NTSB should curtail unnecessary interference with a railroad's right to remove event recorder data and to resume service.

⁷ In Louisiana, for example, the state attempted to enact a law which would have required railroads to hold and furnish event recorder data, among other information, to state regulators following an accident. This law, although passed by the Louisiana legislature, was determined to be preempted by federal law and an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution. United Transportation Union et. Al. v. Louisiana U.S. Dist. Lexis 14576; 14 BNA IER CAS 936 (1998).

III.

Recommendation and Conclusion

NTSB's authority is internally inconsistent and contradictory to the FRA's position on event recorder data retrieval. Without clarification, misunderstanding will continue to occur and the important public purpose of a cooperative, independent accident investigation may not be served. The interests of the public in determining accident cause through analysis of event recorder data can be balanced with the interests of a railroad in the immediate evaluation of event recorder data following an accident.